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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 389

STATE OF FLORIDA, ON RELATION OF HICKS-KESSLER FLYING SCHOOL, INCORPORATED, A FOREIGN CORPORATION, *Petitioner,*

vs.

GEORGE E. HOLT, AS JUDGE OF THE CIRCUIT COURT, IN AND FOR THE ELEVENTH JUDICIAL CIRCUIT, DADE COUNTY, FLORIDA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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SUPREME COURT OF THE UNITED STATES

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No. 389

STATE OF FLORIDA, ON RELATION OF HICKS-KESSLER FLYING SCHOOL, INCORPORATED, A FOREIGN CORPORATION, *Petitioner,*

vs.

GEORGE E. HOLT, AS JUDGE OF THE CIRCUIT COURT, IN AND FOR THE ELEVENTH JUDICIAL CIRCUIT, DADE COUNTY, FLORIDA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

State of Florida, on Relation of Hicks-Kessler Flying School, Incorporated, a corporation of the State of Virginia, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida, entered in the above entitled case on August 21, 1951, and the order of said Court denying rehearing, entered on September 5, 1951 (R. 31-35).

Opinions Below

The lower Courts did not prepare opinions. The order of the respondent, Honorable George E. Holt, Judge of the Circuit Court of Dade County, Florida, denying relator-petitioner's motion to quash purported service was entered

on June 28, 1951 (R. 26, 27). The order of the Supreme Court of Florida denying the petition for issuance of writ of prohibition, entered on August 21, 1951 (R. 31), and the order denying rehearing, entered on September 5, 1951 (R. 35) were upon unreported memoranda.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1251(1), and Rule 12(1), third paragraph. The relator-petitioner has entered a special appearance in the Circuit Court (R. 16). It has removed the case to the Federal Court (R. 17). It has filed in the Federal Court a motion to quash the purported service, denominated a motion to dismiss (R. 23). The United States District Court has remanded the case to the State Court (R. 22). The relator-petitioner has not filed any papers or pleadings in the Circuit Court (except the special appearance referred to), but has argued the motion to quash, filed as a motion to dismiss under Rule 12(b) in the Federal Court. Upon denial by the Circuit Judge of the motion to quash (R. 26), relator-petitioner filed in the Supreme Court of Florida its petition, or suggestion, for writ of prohibition, against the Circuit Judge (R. 27), to prevent the unlawful exercise of jurisdiction over petitioner. Order denying the application for writ of prohibition was entered by the Florida Supreme Court (R. 31). Petition for rehearing was filed (R. 33) but it was denied. Application for stay order was also denied by the Florida Supreme Court but stay was granted under order issued by a Justice of the United States Supreme Court on October 4, 1951.

The application to the Florida Supreme Court (the highest Court of the State), for prohibition, was an original proceeding coming within its supervisory jurisdiction. It is thought that the fact that the said proceeding related

to a now pending law suit in the Circuit Court of Dade County, Florida, does not deprive the judgment denying the prayer for prohibition of its finality, although the primary litigation has not ended. The cases relied upon, as to the foregoing, are *Pacific Coast Dairy* v. *Department of Agriculture*, 318 U. S. 285, 87 L. Ed. 1508, 63 S. Ct. 628, and *Betts* v. *Brady*, 316 U. S. 455, 460-61, 86 L. Ed. 1595, 62 S. Ct. 1252.

Question Presented

The question presented is whether relator-petitioner, a corporation of Virginia, not present in Florida but sued there, together with several other alleged tort-feasors, upon removing the action to the United States District Court on ground of diversity and, for want of constitutionally guaranteed due process, to move to quash and dismiss summons and complaint wherein summons was alleged to have been constructively served, was, after remand, properly held to have waived service of process and to have submitted its person to jurisdiction of State Court, where only pleadings filed in State Court were special appearance and notice of removal and only pleading filed in Federal Court was appropriate to present jurisdictional question, without waiver, being a motion to quash and dismiss.

Statement

An action was filed by Ruth Reese, for the alleged wrongful death of her husband, against relator-petitioner and several others, in the Circuit Court of Dade County, on November 3, 1950 (R. 1). The death was caused by an airplane collision in the air spaces above Sunny South Airport, in Miami. Relator-petitioner, a corporation of Virginia, was charged with responsibility on the basis of being the alleged owner of a Cessna airplane, involved in the collision, which it had "entrusted" or had "rented" either to

one Farries or one Hodges, "for its operation". The so-called Licensed Dangerous Instrumentality Rule was sought to be invoked as a basis for the alleged liability.

On November 7, 1950, there was filed in said Circuit Court a certificate of the Secretary of State of Florida to the effect that he had been served with a copy of the summons and complaint, on behalf of relator-petitioner, under the Nonresident Motor Vehicle Act of Florida (R. 7). This was accompanied by an affidavit of service on the nonresident (R. 8) and notice of service (R. 10). A registered return receipt (R. 13) was also filed.

Thereupon, relator-petitioner filed in said Circuit Court a special appearance (R. 16) for the sole purpose of testing the jurisdiction and for removal of the cause to the Federal Court. Such removal was effected (R. 17) and petitioner filed in the Federal Court its motion to dismiss, presenting defenses of failure to state a claim, of lack of service of process, of improper venue, and of lack of jurisdiction under Rule 12(b), said motion having been filed on November 20, 1950 (R. 24). However, the Federal Court remanded the case (R. 22) on December 28, 1950, without passing upon the motion to quash.

A certified copy of the motion of relator-petitioner, last referred to, was sent down from the Federal Court to the Circuit Court, subsequently, but no other or further pleading was required, or filed, on its behalf. Said motion was then brought on for hearing, without more, at which hearing relator-petitioner contested the purported service of process and continued to deny the Court's jurisdiction over its person. Nevertheless, the Circuit Judge denied the motion (R. 26) and petitioner being without other remedy in the premises, invoked the jurisdiction of the Florida Supreme Court in an original jurisdiction proceeding by way of suggestion for writ of prohibition (R. 27). And as above

noted, the petition for writ of prohibition was denied (R. 31) and the petition for rehearing in connection therewith was also denied (R. 35).

Specification of Errors to Be Urged

The Supreme Court of Florida erred:

1. In denying petitioner's application for writ of prohibition against the Judge of the Circuit Court of Dade County, to prohibit the attempted exercise of unlawful jurisdiction over the person of petitioner, as a nonresident defendant, contrary to due process of law.

2. In holding that Florida Rules of Practice apply to a defendant's pleading, filed in a Federal Court, upon remand, so as to confer jurisdiction, by submission, over the person, where such jurisdiction had not attached.

3. In affirming, or sanctioning, the order of the Circuit Court of Dade County, hereinabove described.

The Circuit Court of Dade County, Florida, erred:

1. In denying petitioner's motion to quash the purported substituted service of process upon petitioner, a Virginia corporation not present or doing business in Florida.

2. In holding that the Florida Nonresident Motorist Statute, Sections 47.29 and 47.30, Florida Statutes, is applicable to a person living in another and distant state, who is the owner of an airplane.

3. In holding that a defendant, in filing in a Federal Court, pursuant to the Federal Rules of Civil Procedure, a motion to dismiss, presenting defenses of failure to state a claim, of lack of service of process, of improper venue and of lack of jurisdiction under Rule 12(b) has, upon a remand of the case to the State Court, submitted to the jurisdiction of the State Court by reason of the filing of said pleading in the Federal Court, wtihout more.

The petitioner says, further, that with respect to each of the said assignments, the Court proceeded in a manner violative of the guarantee of the provisions of the Constitution of the United States, and of the Fourteenth Amendment thereto, in depriving petitioner of due process of law.

Reasons for Granting the Writ

1. It is entirely clear that the petitioner, as defendant, did not appear either in the Circuit Court of Dade County or in the United States District Court for the purpose of trying the case on the merits, but did appear for the purpose of setting aside the process and raising jurisdictional questions pursuant to the Federal Rules of Civil Procedure, Rule 12(b).

2. A foreign corporation does not waive invalidity of an attempted service of process on it by a State Court through petitioning for a removal of the cause to the Federal Court. *General Investment Co.* v. *Lake Shore R. Co.*, 260 U. S. 261, 67 L. Ed. 244, 43 S. Ct. 106.

3. At each stage of the proceeding, petitioner has challenged appropriately, and has denied, that it has been served validly with process in the case. See special appearance filed in Circuit Court (R. 16); also, paragraph 7 of petition for removal (R. 18, 19), laying predicate for question in Federal Court as to whether purported service amounted to "due process"; also, the second, third, fourth, fifth, sixth, seventh, eighth, ninth and tenth numbered paragraphs of defendant's motion, filed in the Federal Court (R. 24, 25) to quash the purported service and dismiss the action. When all of the actions taken, and procedures resorted to by a party defendant have been by way of authorized frontal attack upon the purported service of the process, and by way of denial of the Court's jurisdiction, it cannot properly be said that such party has "voluntarily" subjected itself to

the jurisdiction of the Court. See *General Investment Co.* v. *Lake Shore R. Co., supra.*

4. While the case was improperly remanded by the United States District Court for the Southern District of Florida, Miami Division, to the Circuit Court of Dade County, the error thereby committed is not subject to being corrected in this proceeding. Nevertheless, the record affirmatively discloses that the question as to service of process, and due process, was presented to the Federal Court appropriately, and in strict conformity with Rule 12(b) of the Rules of Civil Procedure. The Federal Court failed and refused to decide the question so presented, and remanded the case to the State Court, but in so doing, it did not confer, and could not confer, upon the State Court the right to hold that in raising the question in due form of law, and under appropriate procedure, petitioner had "waived" the question and had voluntarily submitted itself to the Court, in such manner that the Court had jurisdiction over its person.

5. After the remand, petitioner, as to the filing of any other or further pleadings on its behalf, was bound by the Florida Common Law Rules of Procedure (effective January 1, 1950). Under Rule 13(b) thereof (copied in appendix) it was too late for petitioner to interpose a motion in the Circuit Court of Dade County to quash the purported service or to challenge the jurisdiction of the Circuit Court over its person. The stated rule requires that every question or defense based upon "lack of jurisdiction over the person", or "insufficiency of process" or "insufficiency of service of process" must be asserted by motion interposed within ten (10) days from the service of process, otherwise such question is waived. Accordingly, petitioner could, at the time of the remand, and afterward, enter no pleading whatever in the State Court without appearing generally and waiving the questions as to jurisdiction and service of

process. However, it was not held that petitioner was in default, but it was held that petitioner, through its pleading filed in the Federal Court prior to remand, had waived the questions as to jurisdiction and service of process. This, we submit, was error, and was contrary to due process of law. In the case of *Ayres* v. *Wiswall*, 112 U. S. 187, 28 L. Ed. 693, 5 S. Ct. 90, at page 92, answer had been filed in the United States Circuit Court and the case was subsequently remanded. Chief Justice Waite said:

> "The fact that Ebenzer R. Ayres had filed his answer in the United States Court is a matter of no importance. That fact did not of itself confer jurisdiction if there had been none before."

It is submitted that the rulings both of the Circuit Court of Dade County, Florida, and of the Supreme Court of Florida with respect to this petitioner's "voluntary" appearance, and waiver of the questions as to service of process and jurisdiction, and as to its submission, are erroneous, and contrary to due process of law.

6. The Nonresident Motorists Substituted Service Act of Florida (Sections 47.29 and 47.30, as amended, Florida Statutes), (copied in appendix), is based upon a hypothetical agency relationship. The Secretary of State of Florida theoretically becomes the agent of a nonresident motorist for the acceptance of the service of process when such motorist avails himself of the privilege of using the public highway of the state. As the statute imposes a contractual obligation in derogation of common law, and affects substantial rights, it cannot be extended by implication to include persons who do not come within its terms, but instead the statute must be strictly construed. *Wood* v. *White*, 97 F. 2d 646, 68 App. D. C. 341, certiorari denied *White* v. *Wood*, 304 U. S. 578, 82 L. Ed. 1541, 58 S. Ct. 1048.

The test of the applicability of the mentioned statute

was stated in *Ex Rel. Penick & Ford* v. *Civil Court of Record of Duval County,* 126 Fla. 550, 127 Fla. 331, 171 So. 516 (1936), as follows:

> "The test of applicability of Chapter 17254, supra (Laws 1935, set out in Sections 47.29 to 47.32), is the nonresidence of the motor vehicle owner. Where nonresidence is alleged or established, the operation of motor vehicles in the State of Florida, by or under the nonresident owner thereof, is to be deemed an acceptance by such nonresident of the privilege of using the roads of Florida only upon condition of the nonresident's acceptance of Chapter 17254, Acts 1935, as incident to such use of Florida roads."

The Federal Government, through the Civil Aeronautics Authority, controls Aeronautics over the entire nation. The Air Commerce Act of 1926 and the Civil Aeronautics Act of 1938, gave to the United States complete exclusive national sovereignty in the air space over this country. Use of such air space is not, we submit, tantamount to the acceptance of an invitation to use the public highways of the State of Florida in such manner as to permit the imposition of a contractual obligation in derogation of common law. As we see it, no such obligation has been imposed, or attempted, and the existing law cannot, we submit, be extended by implication in such manner as to be made applicable to aircraft.

The Florida statute, above mentioned, is silent as to substituted service upon a nonresident owner of aircraft. Justification for the decisions of the Courts below would require reading into the statute matter not contained therein.[1]

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[1] It is suggested that Minnesota has enacted legislation providing that the operation of an aircraft within the state by a nonresident, or his agent, shall be deemed an appointment of the Minnesota Commissioner of Aeronautics as the attorney for such nonresident for the service of process

The Florida Statutes are replete with definitions of the words "motor vehicle" to refute any possible argument on the part of the respondent, that an aircraft is a motor vehicle designed for use upon the public highways of this state, and therefore, was included within the intent of the Nonresident Motorists Substituted Service Act, *supra.* In Section 317.01, Laws of Florida, 1941, Section 11, a motor vehicle is defined as follows:

> "Every vehicle which is self-propelled and every vehicle which is propelled by electric power obtained from overhead trolley wires, but not operated upon rails."

In subsection 28 of the same section of the statute, the word "vehicle" is defined as follows:

> "Every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except devices moved by human power or used exclusively upon stationary rails or tracks."

In Section 317.74, Laws of Florida 1939, Subsections 1 and 2, the same definitions of "motor vehicle" and "vehicle" appear as quoted above, and form the basic definitions for the Florida Motor Vehicle Safety Law incorporated within Chapter 317, Subsection .73 *et seq.*, Laws of Florida 1949. Also in Section 320.01, Laws of Florida 1941, being a part of the Florida Motor Vehicle License Law, Subsection 1 defines "motor vehicle" as follows:

> "Motor vehicle includes automobiles, motorcycles, motor trucks and all other vehicles operated over the public highways and streets of this state and propelled by power other than muscular power, but does not

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in any action growing out of such operation. We refrain from discussing such legislation, for the reason that this law has not been enacted in Florida and detailed discussion of it here would be manifestly out of place.

include traction engines, road rollers, and such vehicles as run only upon a track."

In Florida's New Financial Responsibility Law, Chapter 324, Laws of Florida, 1947, and 1949, in Section 324.01, Subsection 1, a "motor vehicle" is defined as follows:

> "Motor vehicle—every self-propelled vehicle which is designed for use upon a highway, including trailers and semi-trailers designed for use with such vehicles (except traction engines, road rollers, farm tractors, tractor cranes, power shovels, and well drillers) and every vehicle which is propelled by electric power obtained from overhead wires but not operated upon rails."

The term "motor vehicle" has always connoted a device designed for operation upon the public highways. All of our statutes appertaining to the use of automobiles, define a motor vehicle as such.

The leading Federal case seems to be *McBoyle* v. *U. S.*, 75 L. Ed. 817, 283 U. S. 25, 165 A. L. R. 916, wherein Mr. Justice Holmes, in writing the opinion of the Court, held that the term "motor vehicle" as used in the National Motor Vehicle Theft Act, was not broad enough to include aircraft. The Court reasoned that the question involved in the case was the meaning of the word "vehicle", in the phrase "any other self-propelled vehicle not designed for running on rails." The Court remarked that airplanes were well known when the statute was passed, and that while etymologically it would be possible to use the word to include an airplane, in everyday speech "vehicle" calls to mind the picture of a thing moving on land.

7. In the case at bar, the Florida Supreme Court has not held that the attempted substituted service was valid or that petitioner, an absent Virginia corporation, could in any event be served by reason of ownership of an airplane,

under the Florida Nonresident Motorist Act. It has evaded the question by saying that petitioner "submitted itself to the jurisdiction of the Court" (R. 31), as above stated. In the case of *Cherry* v. *Heffernan*, as Judge of the Civil Court of Record of Dade County, 132 Fla. 386, 182 So. 427 (1938), the same Court suggested (bottom of page 429) that if no other basis could be found to hold service on a nonresident sufficient, when such a defendant comes into the Florida Supreme Court with a petition for prohibition (original jurisdiction) that will be held as a general appearance in the primary lawsuit. However, we need cite no authority for the proposition that a decision of a Florida Court is not binding upon this Court in determining whether attempted substituted service is in accordance with due process and as to whether a motion to quash under Rule 12(b) in a Federal Court is a voluntary general appearance.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted. A transcript of the record of the proceedings in the Circuit Court of Dade County has been lodged in and is held by the Supreme Court of Florida. Petitioner submits, accordingly, that the writ may be addressed to the Supreme Court of Florida, but prays, in the alternative, that the writ may be issued to both of said State Courts, jointly or in the alternative, as may appear meet.

Respectfully submitted,

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APPENDIX

The following is an excerpt from the Florida Common Law Rules of Procedure, adopted by the Supreme Court of Florida, on November 22, 1949, and effective on January 1, 1950:

A. RULE 13. DEFENSES:

(a) . . .

(b) How Presented. Every defense in law or in fact to a cause of action or claim for relief in any pleading, whether original claim, counterclaim or cross-claim, shall be asserted in the responsive pleading thereto, if one is required; except that the following claims or defenses may at the option of the pleader be made by motion to dismiss: (1) lack of jurisdiction over the subject matter; (2) lack of jurisdiction over the person; (3) improper venue; (4) insufficiency of process; (5) insufficiency of service of process; (6) failure to state a claim or defense upon which relief can be granted; (7) failure to join indispensable parties. By filing a motion to dismiss on the sole ground of lack of jurisdiction over the person, or insufficiency of process or service of process, the movant, in the event the motion is granted, shall not be deemed by filing and arguing the motion to have submitted himself to the general jurisdiction of the court. A motion raising any of these defenses shall be made within 10 days from the service of a copy of the complaint, counterclaim or cross-claim, or (except as to defenses 2, 4, and 5) such defenses may be included in the answer or other pleading when it is filed. Except as to defenses 2, 4, and 5, no defense shall be deemed waived by reason of its being joined with one or more other defenses or objections in a responsive pleading or motion.

The following excerpts are from the Florida Statutes containing the Florida Nonresident Motorists Substituted Service Law. Section 47.29, as amended, is as follows:

B. 47.29. Service of Process upon Nonresident Motor Vehicle Owners, etc.:

(1) Any nonresident of this state, being the operator or owner of any motor vehicle, who shall accept the privilege extended by the laws of this state to nonresident operators and owners, of operating a motor vehicle or of having the same operated, or permitting any motor vehicle owned, or leased, or controlled by them to be operated with their knowledge, permission, acquiescence or consent, within the State of Florida, or any resident of this state, being the licensed operator or owner of or the lessee, or otherwise entitled to control any motor vehicle under the laws of this state, who shall subsequently become a nonresident or shall conceal his whereabouts, shall, by such acceptance or licensure, as the case may be, and by the operation of such motor vehicle, either in person, or by or through his, her, or its servants, agent, or employee, or by person with his, her or its knowledge, acquiescence and consent, within the state of Florida make and constitute the secretary of State of Florida, his, her, its or their agent for the service of process in any civil suit or proceeding instituted in the courts of the State of Florida against such operator or owner, lessee or other person entitled to control of such motor vehicle, arising out of or by reason of any accident or collision occurring within the state in which such motor vehicle is involved.

(2) If any person upon whom service of process is authorized to subsection (1) shall die, service shall be made upon his administrator, executor, curator or personal representative in the manner prescribed by Section 47.30. As amended Laws 1949, c. 25003, Subsections 1, 2.

47.30. Method of Service upon Nonresident:

Service of such process shall be made by leaving a copy of the process with a fee of two dollars in the hands of the secretary of state, or in his office, and such service shall be sufficient service upon a defendant who has appointed the secretary of state as his agent, for the service of such process; provided, that notice of such service and a copy of the process are forthwith sent by registered mail by the plaintiff, or his attorney, to the defendant, and the defendant's return receipt and the affidavit of the plaintiff, or his attorney, of compliance herewith are filed with the papers in the case on or before the return day of the process or within such further time as the court may allow, or that such notice and copy are served upon the defendant, if found within the state, by an officer duly qualified to serve legal process, or, if found without the state, by a sheriff or deputy sheriff of any county of this state or by any duly constituted public officer qualified to serve like process in the state or jurisdiction where the defendant is found; and the officer's return showing such service to have been made is filed in the case on or before the return day of the process or within such further time as the court may allow.

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SUPREME COURT OF THE UNITED STATES

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STATE OF FLORIDA, ON RELATION OF HICKS-KESSLER FLYING SCHOOL, INCORPORATED, A FOREIGN CORPORATION, *Petitioner,*

vs.

GEORGE E. HOLT, AS JUDGE OF THE CIRCUIT COURT, IN AND FOR THE ELEVENTH JUDICIAL CIRCUIT, DADE COUNTY, FLORIDA, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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vs.

GEORGE E. HOLT, AS JUDGE OF THE CIRCUIT COURT, IN AND FOR THE ELEVENTH JUDICIAL CIRCUIT, DADE COUNTY, FLORIDA, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE RESPONDENT IN OPPOSITION

Opinions Below

The Order of the Supreme Court of Florida denying the Suggestion for Issuance of Writ of Prohibition entered on August 21, 1951 (R. 31), and the Order denying rehearing, entered on September 5, 1951 (R. 35) were upon unreported memoranda.

Jurisdiction

The Order of the Supreme Court of Florida denying the Suggestion for Issuance of Writ of Prohibition was filed on August 21, 1951 (R. 31). A Petition for Rehearing was denied on September 5, 1951 (R. 35). The Petition for a Writ of Certiorari was filed on October 20, 1951. The jurisdiction of this Court is attempted to be invoked under 28 U. S. C. Section 1251 (1) and Rule 12 (1), third paragraph.

Question Presented

Should this Court grant a Petition for a Writ of Certiorari from a final Order of a State Supreme Court where: (a) No proper statutory basis for jurisdiction is shown in the Petition; (b) No Federal Question was raised before the State Supreme Court; and (c) No Federal Question was involved in the decision of the State Supreme Court, which Court determined that a non-resident defendant in court before it had entered a general appearance by its actions and pleadings in the State Court, and thereby submitted itself to the jurisdiction of the State Court.

Statement of the Case

This is a Petition for a Writ of Certiorari seeking to have this Court review the Order of the Supreme Court of Florida denying the suggestion for issuance of a Writ of Prohibition filed on behalf of Petitioner (R. 27) because the Supreme Court of Florida was of the view that the Petitioner had submitted itself to the jurisdiction of the trial court, and thereby was precluded from attacking the sufficiency of the process by which it had been brought into court (R. 31). A Petition for Rehearing filed on behalf of the Petitioner (R. 33) was also denied (R. 35).

The statement of the case filed by Petitioner is substanti-

ally correct and is accepted by the Respondent, subject to the following statements which are necessary to correct certain inaccuracies and omissions therein.

The Complaint (R. 1) filed on behalf of the Plaintiff in the trial court below invoked the doctrine of *Respondeat Superior* in addition to the licensed dangerous instrumentality rule as a basis for asserting liability against the Petitioner (one of several Defendants in the trial court below).

After the Federal District Judge determined that the case had been improperly removed to the Federal Court, and remanded it to the State Court (R. 22), the Clerk of the Federal Court certified the pending "Motion to Dismiss, presenting defenses of failure to state a claim, of lack of service of process, of improper venue and of lack of jurisdiction, under Rule 12 (b)" (R. 23) to the State Court. This Motion was then brought on for hearing in the State Court, at which hearing the Petitioner appeared and argued through its counsel, and after argument of counsel the trial judge denied the Motion and ordered the Petitioner to file its Answer within thirty (30) days. (R. 26)

The Petitioner then filed its Suggestion for Issuance of Writ of Prohibition (R. 27) as an original action in the Supreme Court of Florida, with the result indicated in the first paragraph above.

ARGUMENT

No Proper Statutory Basis for Jurisdiction Is Shown

The jurisdiction of this Court has not been properly invoked, as Petitioner is seeking a Writ of Certiorari under 28 U. S. C., Section 1251 (1), which deals solely and exclusively with the original and exclusive jurisdiction of this Court, and has nothing whatsoever to do with a Petition for a Writ of Certiorari. Nor is this a case where this Court

would have original jurisdiction under this Section, for it is clearly not an action or proceeding by a State against a citizen of another State. Under the law of the State of Florida, the State is not even a necessary party in a proceeding in prohibition brought in the State Court. *Frederick* v. *Rowe*, 105 Fla. 193, 140 So. 915 (1932); *Cherry* v. *Heffernan*, 132 Fla. 386, 182 So. 427 (1938), and even if it were, the suit would be one by a State against one of its own public officials and residents, and this Court would have no original jurisdiction in such a case. *Georgia* v. *Penn. R. R. Co.* 324 U. S. 439, 89 L. Ed. 1051, 65 S. C. 716 (1945). Nor has the Petitioner attempted to institute an original action in this Court, for it seeks a Writ of Certiorari according to its Petition. Having failed to show any authority for this Court to assume jurisdiction in this cause, it is respectfully submitted that the Petition should be dismissed.

No Federal Question Raised in State Court

This is a Petition for a Writ of Certiorari to have reviewed the denial of Petitioner-Relator's Suggestion for Issuance of Writ of Prohibition (R. 31). While Petitioner-Relator filed a Petition for Rehearing which was denied (R. 35), and the Petitioner has stated that it seeks Certiorari to review the Order of the said Court denying the rehearing, no error in that regard is specified as an error to be relied on in the specification of errors in the Petition before this Court. It is well settled that this Court will not grant Certiorari to review the decision of a State Court unless a Federal Question was raised in the lower court and was involved in its decision. *Connecticut Ex Rel. New York and N. E. R. Co.* v. *Woodruff*, 153 U. S. 689, 38 L. Ed. 869, 14 S. C. 976 (1894); *Boughton* v. *Exchange Bank*, 104 U. S. 427, 26 L. Ed. 765 (1881); *French* v. *Hopkins*, 124 U. S. 524, 31 L. Ed. 536, 8 S. C. 589 (1887).

The Suggestion for Issuance of Writ of Prohibition (R. 27) which was an original action before the Supreme Court of Florida and the denial of which is here sought to be reviewed, did not raise any Federal Question. It did not set up or claim any title, right, privilege or immunity under the Constitution, Treaties or Statutes of, or commission held or authority exercised under, the United States. With respect to its rights the Petitioner-Relator said in its Suggestion:

> "Your petitioner alleges that the purported service of process upon this petitioner as a non-resident corporation, was without sanction or authority of law, and that the respondent was without jurisdiction to enter said order denying of the motion of this petitioner, to quash said service of process, which was patently invalid under the Laws of the State of Florida, and conferred no jurisdiction upon the court or this respondent. In assuming and entertaining jurisdiction of this cause against this petitioner-defendant, respondent Judge of the Circuit Court in and for Dade County, Florida, exceeded the jurisdictional power granted to him as Judge of said Court, under the Constitution and the Laws of the State of Florida." (R. 29)

Though Petitioner is urging in its Petition here that it was denied due process of law under the *Federal* Constitution, no such claim was raised in the State Court, and it is precluded from raising it first in its Petition to this Court.

Although no error is alleged in the denial of the Petition for Rehearing by the Supreme Court of Florida in the specification of errors to be urged in the Petition presented here, even if it were also alleged as error, the result would be the same. Petitioner here complains that the State Supreme Court denied it due process of law under the Federal Constitution in determining that Petitioner entered a general appearance in the trial court. No such claim was

made in its Petition for Rehearing (R. 33). The only mention of the Due Process Clause of the Federal Constitution in the Petition for Rehearing is found in Paragraph 4 (R. 34), where the Petitioner asserted that the purported service of process was contrary to the Federal Due Process Clause.

As Petitioner admits in Paragraph 7 on Page 11 of its Brief, the Supreme Court of Florida never did determine the question of the validity of the service of process, for it found the Petitioner to have submitted to the jurisdiction by making a general appearance in the trial court, which gave the trial court jurisdiction whether or not the original service of process was valid. Inasmuch as the Petition before this Court does not attempt to set up any Federal Question other than a denial of due process under the Federal Constitution, and since the record clearly shows no such Federal Question was raised before the Supreme Court of Florida, it is respectfully submitted that the Petition should be dismissed.

No Federal Question Involved in the Decision of State Court

It is well established that on a Petition for Certiorari from a final decision of a State Court to this Court, the record must show that the decision of the State Court rested upon the disposition of a Federal Question in order for this Court to review such a decision. *March* v. *Nichols & Co.*, 140 U. S. 344, 35 L. Ed. 413, 11 S. C. 798 (1890), and that questions purely of local practice are not Federal Questions. *F. G. Oxley Stave Co.* v. *Butler County*, 166 U. S. 648, 41 L. Ed. 1149, 17 S. C. 709 (1897).

What constitutes a general appearance in a State Court as distinguished from a special appearance is a question of local practice, and does not raise a Federal Question of Due Process. *York* v. *Texas*, 137 U. S. 15, 34 L. Ed. 604, 11 S. C.

9 (1890); *Western Life Indemnity Company of Illinois* v. *Rupp*, 235 U. S. 261, 59 L. Ed. 220, 35 S. C. 37 (1914); *see Chicago Life Insurance Company* v. *Cherry*, 244 U. S. 25, 61 L. Ed. 966, 37 S. C. 492 (1917).

There is no question here but that the Petitioner was given notice and an opportunity to be heard on the question of jurisdiction, for it has appeared and argued it thoroughly. The fact that the Florida Supreme Court has decided adversely to Petitioner's position furnishes it no magic carpet to review by this Court. What happened to Petitioner was that it forgot that the Federal Rules of Civil Procedure and the Florida Common Law Rules of Practice are not the same, and that while under Federal Rule 12 (b) it would be allowed to contest the jurisdiction and plead to the merits at the same time in the Federal Court, the Florida Common Law Rules are to the contrary in regulating practice in the State Courts. The applicable Florida Common Law Rule is Rule 13 (b) which is set forth in the *Appendix* to the Petition. That Rule does not allow a movant to combine his defenses to the jurisdiction, with his defenses to the merits without submitting himself to the jurisdiction of the Court. The Florida Supreme Court did not hold that the filing of a Petition for removal to the Federal Court constituted a general appearance as Petitioner would have this Court believe. The Florida Supreme Court held that when the Petitioner adopted, argued, and secured a ruling in the State Court after remand, on its Motion to Dismiss presenting the defenses of failure to state a claim on which relief could be granted, together with defenses to the jurisdiction, that the Petitioner under the provisions of Rule 13 (b) submitted itself to the general jurisdiction of the State Court.

As indicated in the *York* v. *Texas* case, *supra*, the Petitioner did not have to come into the Florida Court at all if it did not consider itself under the jurisdiction of the

Florida Court. It could have waited and resisted the attempt to collect any judgment against it as a result of the action, on the ground that the judgment was entered without any jurisdiction. Having determined to enter the Florida Court to have the question of jurisdiction determined, however, it did so subject to the Rules of Practice of the Florida Court, and under those rules it has submitted itself to a general appearance according to the decision of the Florida Supreme Court.

At Page 12 of the Petition, the Petitioner states that the case of *Cherry* v. *Heffernan, supra,* is authority for the proposition that, in Florida, the appearance of a non-resident in the Supreme Court with a Petition for Prohibition will be held a general appearance, and submission to the jurisdiction, even if the service of process has not been sufficient, and we agree that it is authority to that effect. This but adds another string to our bow, for it furnishes another ground for the decision of the Florida Supreme Court which clearly does not raise a question of Federal Due Process under the case of *York* v. *Texas, supra,* and the cases which have followed it.

Petitioner also admits in its Petition, at Page 3, that the only final judgment from which review by certiorari might properly be sought in this case, is the Order denying the Suggestion for Issuance of Writ of Prohibition, and with this we agree, though it appears that the case of *Michigan Central Railroad Company* v. *Mix,* 278 U. S. 492, 73 L. Ed. 470, 49 S. C. 207 (1929) is better authority for the proposition than the cases cited by Petitioner. The Petitioner further admits that the primary litigation has not ended. This is also true, and for that reason it is respectfully submitted that any Orders of the Circuit Judge of the Circuit Court of Dade County, Florida, where this case is now pending, are not properly before this Court on Petition for

Writ of Certiorari and should not be considered by this Court.

No Question Concerning Service or Process Is Before the Court

The Respondent does not propose to burden the Court with argument concerning the construction of the Florida Statute under which the Petitioner was served with process. The Supreme Court of Florida specifically refused to decide that question in its Order and the Petitioner admits that fact on Page 11 of the Petition. That question is obviously not before this Court at this time, and this Court has no way of ascertaining how the Florida Supreme Court will construe the Statute with respect to the owners of aircraft when it is squarely confronted with that problem for decision. At this time the question is moot.

Conclusion

The Petitioner has failed to cite any statutory authority which can be the basis for this Court to assume jurisdiction in this case, and therefore the Petition is insufficient on its face, and should be dismissed. The Petitioner failed to raise any Federal Question before the Supreme Court of Florida, and no Federal Question was involved in the decision of the Florida Supreme Court in denying the Writ of Prohibition, since the question of what constitutes a general appearance as distinguished from a special appearance in a State Court, is a question of local law to be decided by the State Court, and does not raise a question of Federal Due Process. The Petitioner had notice and an opportunity to be heard on the question of jurisdiction in the State Court, and has litigated that question thoroughly in the State Court.

The Petition, on its face, plainly indicates that it is

frivolous and sham, and that it has been interposed solely for delay and to harass the plaintiff widow in the trial court by additional delay and expense which it knows she can ill afford.

We respectfully request the Court to dismiss or to deny the Petition, and to award to the Respondent such costs and fees as the Court may determine he is entitled to receive.

Respectfully submitted.

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Attorney for Respondent.

WALTER H. BECKHAM, JR.,
Of Counsel.

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